United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF AND APPENDIX

76-4141

To be argued by:

JULES E. COVEN, ESQ.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HEINZ H. HEITLAND (A17 587 648)
and
HENNELORE HEITLAND (A19 492 601)

Petitioners,

- against -

DOCKET NO. 76-4141

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

B
P/S

BRIEF OF PETITIONERS

AND APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HEINZ H. HEITLAND (A17 587 648) and HENNELORE HEITLAND (A19 492 601)	:	
Petitioners,	:	
-against-	:	DOCKET NO. 76-4141
IMMIGRATION AND NATURALIZATION SERVICE,	:	
Respondent.	:	

BRIEF OF PETITIONERS

PRELIMINARY STATEMENT

The petitioners seek review of Orders of the Board of Immigration Appeals, dated April 13, 1976 and January 25, 1976, which Orders denied the applications of the petitioners for suspension of deportation 8 U.S.C. 1254, and for the adjustment of their immigration status, pursuant to Sec. 245 of the Immigration and Nationality Act, 8 U.S.C. 1255. The jurisdiction of this Court in this matter is pursuant to the provisions of Public Law 87-301, U.S.C. 1105(a).

STATUTE INVOLVED

Section 212 of the Immigration and Nationality Act, 8 U. S.C. 1182 (a)

"Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission in the United States;... ....."

"(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skill or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed."

Section 245 of the Immigration and Nationality Act, 8 U.S.C. 1255 (a)

"The status of an alien, other than an alien crewman, who was inspected and admitted or paroled in the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigration visa and is admissible to the United States for permanent residence, and (3) an immigrant vise is immediately available to him at the time his application is approved."

STATUTE INVOLVED

Section 244 of the Immigration and Nationality Act, 8 U.S.C. 1254 (a)

" as hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and (1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; ....."

THE REGULATION INVOLVED

Section 8 CFR 212.8 (b) (4), as it was when application for adjustment was made, read:

"(b) Aliens not required to obtain labor certifications. The following persons are not considered to be within the purview of section 212 (a) (14) of the Act and do not require a labor certification:....(4) an alien who will engage in a commercial or agricultural enterprise in which he had invested or is actively in the process of investing a substantial amount of capital."

QUESTIONS INVOLVED

1. WAS THE BOARD OF IMMIGRATION APPEALS IN ERROR WHEN THEY REFUSED TO FIND THAT THE PETITIONER, HEINZ HEITLAND WAS EXEMPT FROM HAVING TO OBTAIN A LABOR CERTIFICATION WHERE THE PETITIONER HAD ENGAGED IN A COMMERCIAL ENTERPRISE FOR FOUR YEARS AT THE TIME OF APPLICATION, AND HAD NOT ENTERED THE LABOR MARKET DURING THAT PERIOD?

2. WAS THE BOARD OF IMMIGRATION APPEALS IN ERROR WHEN IT OVER-RULED THEIR OWN PRECEDENT DECISION RETROACTIVELY?

3. WAS THE BOARD OF IMMIGRATION APPEALS IN ERROR WHEN THEY SET FORTH STANDARDS NOT REQUIRED, EITHER BY REGULATION OR BY STATUTE?

4. WAS THE BOARD OF IMMIGRATION APPEALS IN ERROR WHEN THEY ENTERED A DECISION WHICH IS IN CONFLICT WITH A DECISION MADE BY THE ADMINISTRATIVE BRANCH OF THE IMMIGRATION SERVICE?

5. WAS THE BOARD OF IMMIGRATION APPEALS IN ERROR WHEN IT RULED THAT THE ALIENS WERE INELIGIBLE TO APPLY FOR SUSPENSION OF DEPORTATION BECAUSE THE ALIENS HAD MADE A BRIEF, CASUAL VISIT ABROAD?

THE FACTS

The petitioners are husband and wife. Both of the petitioners were born in Germany. HEINZ HEITLAND, a male, obtained Canadian citizenship. However, there is a question as to whether or not he has lost such citizenship. They are parents of a United States Citizen child, who is six years old, and who resides with them. The petitioners entered the United States in 1968. In December, 1970, they left the United States for a brief visit to Germany due to a family emergency. They returned to the United States to resume their residence in February, 1971.

The essential facts are that in 1970, the petitioner, HEINZ HEITLAND went into a Messenger Service Delivery business, and based upon his investment and operation of his own commercial enterprise, in 1972, he made an application for the adjustment of his status, pursuant to Sec. 245 of the I&N Act, 8 U.S.C. 1255. His application was approved by the Immigration Judge. The basis of his application was that since he had made an investment in a commerical enterprise, he was exempt from obtaining a labor certification. The Government took an appeal from a October 5, 1972 decision of the Immigration Judge. The Board of Immigration Appeals reversed the decision granting the petitioners permanent residence. In making this determination, the Board of Immigration Appeals over-ruled their own precedent decision, to wit: MATTER OF FINAU, 12 I&N Dec. 86 (BIA 1967).

When this matter was overturned by the Board, the matter was remanded back to the Immigration Judge to allow the petitioners to make application for voluntary departure. When the case was again heard before the Immigration Judge, the petitioners had then resided in the United States continuously for more than seven years. The petitioner, therefore, made application for the suspension of their deportation, pursuant to Sec. 244 of the I&N Act, 8 U.S.C. 1254. This application was denied on the basis that the petitioners having been out of the United States from December, 1970 to February 4, 1971, had interrupted the continuity of their physical presence in the United States, and therefore, were ineligible to apply for the suspension of their deportation.

This decision was appealed to the Board of Immigration Appeals, and the Board of Immigration Appeals issued the final Order on April 13, 1976, dismissing the Appeal.

This petition to review, filed less than six months after the final Order of April 13, 1976 seeks review of both the Order of April 13, 1976 and January 25, 1974.

ARGUMENT

POINT I

THE DECISION DENYING THE PETITIONER'S APPLICATION FOR ADJUSTMENT OF STATUS WAS IN ERROR AS A MATTER OF LAW.

The petitioners, based upon the applicable law of 1972 applied for the adjustment of their status, pursuant to the provision of Sec. 245 of the I&N Act. This section allows an alien in the United States on a temporary basis to become a permanent resident, if a visa number is available, and if the petitioner can qualify for the issuance of an immigrant visa. In 1972, based upon the law then in question, the Immigration Judge granted the petitioners' application for adjustment of status, finding that the petitioners were not required to obtain labor certifications pursuant to Sec. 212 (a)(14) of the I&N Act. MRS. HEITLAND would receive the same treatment based upon her husband's application. As stated in the decision of the Immigration Judge of October 4, 1972, MR. HEITLAND decided to establish a Merchandise and Messenger Delivery Service. He purchased a Volkswagon panel truck in October, 1968 for $2,700.00. He became engaged in a business of delivering letters and smaller packages in the New York metropolitan area. He obtained most of his trade from a company which obtained such orders. He is one of many independent sub-contractors who accept orders from the delivery service, carries them out, and

received sixty percent of the fee. He also has some personal customers whose business he also handles from time to time. In August, 1971, he purchased another new Volkswagon panel truck for use in the business for the sum of $3,000.00. The panel truck was not used for anything other than the business , as the petitioner had a private automobile for personal use of himself and his family. He also has a two-way radio in this car to keep in touch with his customers. In 1970, his gross annual business was over $14,000.00. In 1970, he had $6,000.00 in a savings bank, plus some real estate which he purchased in Florida, which he valued at $11,000.00. At his hearing, he maintained that once he obtained legal permanent residence he would be able to obtain bonding which is necessary to engage in a trucking business on a larger scale. He indicated that he could not expand his business without permanent residence in the United States. His hope and intention was that he would be able to obtain a larger truck for the shipment and delivery of larger type merchandise. In 1972, when he applied for status as a permanent resident, he had been operating his business for four years as a sole occupation. He did not receive welfare or public assistance, nor was he employed in any other occupation.

The Immigration Judge found that he had the equipment, the know-how and facilities to carry on a commercial enterprise. In the four years that he had been engaged in this independent enterprise venture, he had acquired the ability and had the capital

to expand it further. The Immigration Judge found that he was, therefore, exempt from the labor certification requirement. The Immigration Judge relied upon the applicable case law at that time, to wit: Matter of FINAU, 12 I&N Dec. 86 (BIA 1967).

The application is a discretionary application, and the Immigration Judge found that discretion should be favorably exercised, based upon the fact that they were parents of a United States Citizen child, and that there was nothing detrimental in their record.

The Immigration Service was not content with the decision of the Immigration Judge and took an appeal to the Board of Immigration Appeals. While the appeal was pending, the regulations with reference to an investment exemption from a labor certification requirement was made. The regulation stated that the capital investment in a commercial enterprise must be at least $10,000.00, and the applicant must have at least one year's experience or training qualifying him to engage in such an enterprise.

The Board of Immigration Appeals, however, said they would rule upon the petitioner's application, based upon the regulations in effect at the time of the alien's application. They based this decision upon the Matter of KO, Int. Dec. 2201 (DEP ASSOC COM 1973). The regulation in effect at the time the aliens made their application did not have a dollar requirement, nor did it have a one years experience or training requirement.

However, the Board, although finding that pursuant to the Matter of KO, the new regulation did not apply to the petitioner, reversed their own precedent decision , Matter of FINAU, and held that the petitioner would have to qualify with their new standards as they stated in the decision in his case. They then proceeded to deny his application. In their denial, the Board added additional requirements to both the old and the new regulations. They set forth a requirement that the investment must tend to expand job opportunities. It also stated that the alien's primary function with respect to the investment would not be as a skilled or unskilled laborer. The Board, without foundation, found that the petitioner's actions had placed him in competition with other numerous small company drivers. They also found and required that the petitioner would have to insure that he would not some day in the future enter the labor market. They also said that since the position essentially involved skilled or unskilled labor, he would need a labor certification. The decision of the Board was incorrect for a number of reasons. The Board erred in stating that the alien's investment was insubstantial when they neglected to consider that in effect the alien had purchased two Volkswagon panel trucks, the first in 1968 at the cost of $2,700.00, and the second in 1971, at the cost of $3,000.00. They neglected to consider his statement that additional funds would be invested when his status was adjusted. The requirement of the regulations is that the applicant be in the process of making an investment. The

entire investment need not be made before permanent residency is granted.

The Board mentioned the fact that they wanted insurance that the petitioner would not enter the labor market. He has been conducting business since 1968, and to date, has not taken other work. What better proof is there that the petitioner is not competing with the American labor market when he has not been employed. There can be no better proof than the fact that he has been successful other than his track record.

The alien cannot apply for a labor certification since no labor certification application will be entertained when the requirement of an investment such as in the truck is necessary to obtain the position. The Labor Department recognized the fact that an independent contractor is not entering the labor market.

Working as an employee where you are paid by the hour on a regular basis is essentially different from the type of enterprise that the petitioner is engaged in. An employee need not keep his own books and records. An employee does not pay his own social security. An employee has Federal Income Tax withheld from his pay check, and does not file a declaration of estimated income. An employee is not required to use and pay for his own truck. The petitioner herein did all of the above. He was not employed, and was not in the labor market.

The Immigration Service has recognized that persons who are investing in commercial enterprises will, in many cases, do work which can be either skilled or unskilled, but the purpose of this work is an incidental part of the investment, and does not require the obtaining of a labor certification. See Matter of KO, I&N Dec. 2201. This case which was decided upon May 9, 1973 and published as a precedent decision by the Immigration Service, and cited by the Board of Immigration Appeals, states as follows:

> "The regulation comtemplates that the investor's engaging" in the enterprise will be to an extent which demonstrates an assumption of risk and responsibility for its direction and control. If he is engaged full-time to the extent indicated above - and I find that the applicant her is - it is immaterial what his nominal job in the enterprise may be."

In the case at the abr, the petitioner has assumed the risk. He has twice invested in trucks which are used solely for his business. If business was not good he would not be able to pay for the trucks. If he could not manage or bear the responsibility himself, he could not pay for the trucks, and would suffer an economical loss. As the Regional Commissioner stated in its decision that it is immaterial what the nominal job in the enterprise would be.

Congress and the Immigration Service have realized that entry into a commercial enterprise must involve skilled or unskilled labor, because in all fields of endeavor, the work that one does must be classified as labor, both skilled and unskilled.

The Board of Immigration Appeals, in their decision in the case at the bar, appears to disagree with the precedent decision set forth by the Regional Commissioner in the Matter of Ko. In the case at the bar, the Board said that since the alien is doing skilled or unskilled labor in connection with his enterprise, he is not exempt from the labor certification. The Regional Commissioner had found in the Matter of Ko that the performance of unskilled labor, such as a cashier in the alien's commercial enterprise does not require the obtaining of a labor certification. There are too mahy persons affected by both of these decisions for this inconsistency to continue. The case at the bar must be remanded back to the Immigration Service so that this confusion be corrected.

The HEITLANDS have been misled on two occasions. On the first occasion, they were misled by the Administrative Branch of the Government, as Mr. HEITLAND made his first application for permanent residency in 1968. (This particular application was never litigated before the Immigration Judge, nor before the Board in view of the fact that Mr. HEITLAND was trying to obtain relief in a different manner when he appeared before the Immigration Judge in 1972). Based upon his thought that he might be a permanent resident, and because of emergency reasons, Mr. HEITLAND left the country for five weeks in 1970. Mr. HEITLAND, was again misled by the Immigration Service in establishing

his own business, making an investment, and then having his application denied when the Board of Immigration Appeals had a change of heart and reversed their own precedent decision and required that he comply with other standards.

From the foregoing, it is urged that the decision of the Board of Immigration Appeals be reversed and that this matter be remanded to the Immigration Service, and they be directed to grant the petitioners applications for permanent residence, or in the alternative, that this matter be remanded back to the Immigration Service so that the discrepancies that are apparent in two precedent decisions, to wit: the Matter of Ko and the Matter of Heitland, be resolved.

POINT II

THE PETITIONERS ARE ELIGIBLE TO APPLY FOR SUSPENSION OF DEPORTATION EVEN THOUGH THEY WERE OUT OF THE COUNTRY FOR A SHORT PERIOD OF TIME.

The petitioners entered the United States in 1968.

Their sole absence from the United States was for a five week period ending on February 4, 1971. They had gone to Germany for emergency family reasons. They returned in February, 1971 and they were readmitted to the United States. As the Immigration Judge stated in his opinion of October 4, 1972 "they were returning from a brief absence abroad to resume a residence previously established in the United States".

From 1968, up to the present time, the aliens have resided at Lorimer Street, Brooklyn, New York. They have lived in no other place. In 1968, an application was made by the petitioners for an adjustment of their status. This application was apparently pending at the time the petitioners left the United States in December, 1970. Before leaving, and after returning, the Petitioner Mr. HEITLAND made many

inquiries with reference to this application. He was under the mistaken impression that his application had been granted, but was trying to find out when he would receive his "Green Card". The Immigration Service never responded to any of his inquiries. The Immigration Judge recognized this situation, and stated in his decision of October 4,1972. See appendix, page four, "However, I note, on the other hand, that there is no substantial reason why the respondents were not adjusted prior to their departure. The record is not clear on that point".

When the HEITLANDS returned to the United States from their emergency trip to see their family in Germany, they were readmitted. Obviously, the Immigration Inspector who readmitted them knew that they were not coming in as visitors since they were travelling with their United States Citizen child, and they were returning to their residence in Brooklyh, where they had lived for many years. After this readmission, Mr. HEITLAND went to the Immigration Service to find out what his status was. When it was found out that he was not a permanent resident, the instant proceedings were commenced and the hearing, which is the basis of the case at the bar, was commenced.

The Board denied the aliens' applications for suspension of deportation based upon their short trip outside the United States. The HEITLANDS were found to be

ineligible since they did not have seven years continual, physical presence in the United States. This determination, under the present instant fact pattern, leads to an unjust, and unfair result, and is a harshly strict construction of a statute whose major purpose is to ameliorate hardship.

Prior to 1964, any absence from the United States during the required period of residency, rendered a person ineligible to apply for the suspension of his deportation, pursuant to Sec. 244 of the I&N Act. In 1965, this was changed; see Wadman, (329 F. 2d 812 (9th Cir. 1964) the Court held (by reference to Rosenberg v. Fleuti, 374 U.S. 449 (1963), that an absence which was brief, casual and innocent was not an interruption of the continuity of physical presence required in Section 244(a)". There the Court held that the alien met the requirement of seven years continuous, physical presence, not withstanding the fact that he was absent from the country for ten days. The Court, further stated that

> "In construing 244, we are in an area in which strict construction is peculiarly inappropriate. The apparent purpose of the grant of discretion to the Attorney General is to enable that officer to ameliorate hardship and injustice which otherwise would result from a strict and technical application of the law. A strict and technical construction of the language in which this grant of discretion is couched could frustrate its purpose. A liberal construction would not open the door to suspension of deportation in cases of doubtful merit. It would simply tend to increase the scope of the Attorney General's review and thus his power to act in amelioration of hardship".

The Board of Immigration Appeals after the Wadman case, and after the case of Git Foo Wong v. I&N Service, 358 F 2d 151 (9th Cir) 1966, expanded the rationale in those cases when they decided the Matter of Wong. The Wong case related to an alien who was not a permanent resident. Although he had made five or six short visits outside the United States he was found statutorily eligible for suspension of deportation, and his application was granted. The Board, quoting and citing Git Foo Wong stated:

> "This Court held that the statute should not be strictly and technically construed so as to frustrate its humanitarian purpose of ameliorating hardship and injustice so as to permit discretionary relief from deportation."

The length of time that Mr. Wong was outside the United States was never mentioned in the decision, but for the Board to say, in the case at the bar, that one trip of five weeks is worse than five or six trips out of the United States creates an intolerable situation.

The petitioners have made a home for themselves in the United States since 1968. They have stablished a business, and have a United States citizen child who was born in the United States and resides with them, and is dependent upon them for support. The statute should not be so strictly and technically construed so as to frustrate its humanatarian purpose. The brief absence of the petitioners

from the United States during the pendency of an application for permanent residence should not deny these parents of an American citizen child from the right to apply for the suspension of their deportation. In the instant case, justice demands that this application be considered on its merits.

The alien husband made application for the adjustment of his status two times. The first time, the Administrative Branch of the Government indicated to Mr. HEITLAND that his application would be approved. Not hearing from them after many inquiries, he left to see his family for emergency reasons. Again, he applied for permanent residence, and this Board in a reversal of a prior decision, denied his application which had been approved by the Immigration Judge.

From all of the foregoing, it can be seen that the interests of justice would best be served if the petitioners were found to be statutorily eligible for the relief of suspension of deportation, even though they had a brief, casual trip abroad.

The Congressional purpose would be served. The prime reason for the statute is the amelioration of hardship and this purpose would be satisfied by a direction by this Court, finding that the aliens are statutorily eligible to apply for suspension of deportation so that they would have

an opportunity to reside with their infant child in the United States during their daughter's minority, and at a time when the child needs her parents the most.

CONCLUSION

WHEREFORE, it is respectfully requested that this Court rule that the Board of Immigration Appeals be directed to grant the petitioners application for adjustment of status pursuant to Sec. 245 of the I&N Act, or in the alternative rule that the petitioners are statutorily eligible to apply for the suspension of their deportation, pursuant to Sec. 244 of the I&N Act.

Respectfully submitted,

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United States Department of Justice
Board of Immigration Appeals
Washington, D.C. 20530

Files: A19 492 601 - New York
A17 587 648

APR 13 1976

In re: HEINZ H. HEITLAND and HANNELORE HEITLAND

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Jules E. Coven, Esquire
1 East 42nd Street
New York, New York 10017

ON BEHALF OF I&N SERVICE: George Indelicato
Appellate Trial Attorney

ORAL ARGUMENT: March 16, 1976

CHARGES:

Order: Section 241(a)(2), I&N Act (8 U.S.C. 1251 (a)(2)) - Nonimmigrant, remained longer (female respondent) - No Immigrant Visa (male respondent)

APPLICATION: Suspension of deportation; alternatively, voluntary departure

In an order of deportation, entered on November 13, 1975, the immigration judge ordered the respondents deported, denied their application for suspension of deportation under Section 244(a)(1) of the Immigration and Nationality Act, and granted to them the privilege of voluntary departure. They appeal from the denial of suspension of deportation.

The record relates to a married couple, both of whom are natives of Germany. The husband is a citizen of Canada; the wife is a citizen of Germany. They are the parents of a United States citizen child who is 6 years of age.

The respondents contend that they are eligible for the relief of suspension of deportation, pursuant to Section 244(a)(1) of the Act, on the basis of their entry to the United States during 1968. Both admit that they spent a few weeks in Germany from mid December 1970 until February 4, 1971. They contend that in view of the decision of Wadman v. Immigration and Naturalization Service, 329 F.2d 812 (9 Cir. 1964) they meet the requirement in Section 244(a)(1) of 7 years of continuous physical presence notwithstanding their absence. In Wadman the court held (by reference to Rosenberg v. Fleuti, 374 U.S. 449 (1963)), that an absence which was brief, casual and innocent was not an interruption of the continuity of physical presence required in Section 244(a). 1/

The respondents' absence was neither brief nor casual, see Munoz-Casarez v. Immigration and Naturalization Service, 511 F.2d 947 (9 Cir. 1975). It exceeded six weeks, which is a far more substantial period than Wadman's absence of 5 days. It was not a mere excursion over the border, such as Wadman's trip to Mexico; rather the respondents traveled many thousands of miles to Germany, a trip which necessitated their obtaining three different passports (because of their three different nationalities). Under Fleuti, the need to obtain travel documents is a factor indicating that a departure was meaningfully interruptive. Taking the factors present here as a whole, we find that the respondent's absence from December 1970 to February 4, 1971 was meaningfully interruptive of the continuity of their physical presence, and consequently that they are ineligible for the benefits of Section 244(a).

ORDER: The appeal is dismissed.

1/ In Matter of Wong, 12 I&N Dec. 271 (BIA 1967), this Board adopted the decision of Wadman v. Immigration and Naturalization Service, supra, for nationwide application.

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FURTHER ORDER: Pursuant to the immigration judge's order, the respondents are permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the District Director; and in the event of failure so to depart, the respondents shall be deported as provided in the immigration judge's order.

Acting Chairman

Chairman David L. Milhollan and Board Member Irving A. Appleman abstained from consideration of these cases.

United States Department of Justice
Board of Immigration Appeals
Washington, D.C. 20530

JAN 25 1974

Files: A19 492 601 - New York
A17 587 648

In re: HANNELORE HEITLAND (female)
HEINZ H. HEITLAND (male)

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Jules E. Coven, Esq.
One East 42nd Street
New York, New York 10017

ON BEHALF OF I&N SERVICE: David L. Milhollan
Appellate Trial Attorney

Alexander Schonfeld
Trial Attorney

ORAL ARGUMENT: January 9, 1973

CHARGES:

Order: Sec. 241(a)(2), I&N Act (8 U.S.C. 1251 (a)(2)) - Nonimmigrant - remained longer (female respondent)

Sec. 241(a)(1), I&N Act (8 U.S.C. 1251 (a)(1)) - Excludable at entry under section 212(a)(20), I&N Act (8 U.S.C. 1182(a)(20)) - immigrant not in possession of proper document

A19 492 601
A17 587 648

APPLICATION: Reversal of immigration judge's finding regarding the eligibility of the respondents for adjustment of status under section 245 of the Immigration and Nationality Act

The Immigration and Naturalization Service has appealed the October 4, 1972 decision of an immigration judge which granted the respondents' applications for adjustment of status under section 245 of the Immigration and Nationality Act. The appeal will be sustained and the case remanded for further proceedings.

The alien respondents are husband and wife and natives of Germany. The male respondent is a citizen of Canada and the female respondent is a citizen of Germany. The deportability of each respondent has been conceded and the only issues presented by this appeal involve the grants of adjustment of status.

Section 245 of the Act specifies that an alien seeking this discretionary remedy initially must establish that he has been inspected and admitted or paroled into the United States, that he is eligible to receive an immigrant visa and admissible for permanent residence, and that an immigrant visa is immediately available at the time his application is approved. The respondents have been inspected and admitted as nonimmigrants and they appear to satisfy the "qualitative" provisions of the Act. Therefore, the question of their statutory eligibility centers on whether they qualify for the immigrant status which they seek and on the availability of visas for aliens of that status.

The respondents have sought this relief as nonpreference immigrants from the Eastern Hemisphere. A review of the Department of State Bulletins on Visa Availability

indicates that nonpreference visas were currently available for Eastern Hemisphere immigrants during the months surrounding the hearing and decision below. Consequently, the respondents would have been statutorily eligible for adjustment of status if, at the date of the immigration judge's decision, they satisfied the requirements of section 212(a)(14) of the Act.

Section 212(a)(14) basically precludes the issuance of visas to certain aliens, including nonpreference immigrant aliens, who seek to enter the United States for the purpose of performing skilled or unskilled labor, unless they have obtained the required labor certification. The male respondent concedes that he must work to support himself and his family; furthermore, he acknowledges that he has not obtained labor certification. He nevertheless contends that he qualifies for an exemption from the labor certification requirements of section 212(a)(14) as an "investor" within the contemplation of 8 C.F.R. 212.8(b)(4). On the date of the immigration judge's grant of the respondents' section 245 applications, that regulation stated, in relevant part:

> The following persons are not considered to be within the purview of section 212(a)(14) of the Act and do not require labor certification:
>
> . . .
>
> (4) an alien who will engage in a commercial or agricultural enterprise in which he had invested or is actively in the process of investing a substantial amount of capital.

The pertinent portion of this regulation, however, was modified subsequent to the Service's appeal in this case. See 38 Fed. Reg. 1380, January 12, 1973; 38 Fed. Reg. 8590, April 4, 1973. The regulation now permits the labor certification exemption for:

> (4) an alien who establishes . . . that he is seeking to enter the United States for the purpose of engaging in a commercial or agricultural enterprise in which he has invested, or is actively in the process of investing, capital totaling at least $10,000, and who establishes that he has had at least 1 year's experience or training qualifying him to engage in such enterprise. . . .

It appears that the Service will consider any request for the "investor" exemption filed prior to the effective date of the new rule under whichever formulation of the regulation is more favorable to the alien. Matter of Ko, Interim Decision 2201 (Dep. Assoc. Comm. 1973). We shall follow that approach for purposes of this appeal.

The male respondent presently operates a merchandise and message delivery service. He owns a truck which appears to be equipped with a two-way radio. Orders for the pickup and delivery service are received over the two-way radio from a dispatching firm that subcontracts delivery work to numerous independent drivers. In 1970 the male respondent's gross income from the operation of this enterprise was $14,000; his net income was $4,500. It appears that the truck and the radio, which he values at $3,400, satisfy the capital requirements of his business. His claim to the "investor" exemption, however, includes a present "inveatment" of several thousand dollars in a savings bank account, and a 1964 "investment" of $3,600 in Florida land. He maintains that the land is now worth $11,000.

In order to assess whether the male respondent qualifies as an investor under either formulation of the regulation, we must initially ascertain the amount of his investment. This determination will depend on which of his property holdings can be considered as

investments within the scope of the regulation. For a capital expenditure to qualify as an investment under either approach to the regulation, it is required to be made in a "commercial or agricultural enterprise." Although this phrase is not defined, we have concluded that the Florida land holding and the savings bank account do not qualify as investments within the contemplation of the regulation.

The land holding appears to be of a speculative nature, and the savings bank account, when viewed from the male respondent's perspective, is more an accumulation of funds than an active entrepreneurial undertaking. A "commercial or agricultural enterprise," as we interpret this regulation, requires a business venture productive of some service or commodity. The regulation would be inconsistent with the statute were it to be construed to grant a labor certification exemption to an alien with an idle investment of a modest magnitude who might then be forced to enter the normal labor market in order to supplement the income from the investment. Rather than permitting an alien to usurp an existing job opportunity, the nature of the investment must be such that it tends to guard against the possibility that the alien will compete with American labor for available skilled or unskilled positions. Given the present character of these property items, we cannot say that they tend to expand the job market, or otherwise insure that the male respondent will not occupy an existing position readily available to American workers. Since the truck is the only property item which the male respondent employs in a capacity productive of a commodity or service, we find that the truck represents the extent of his investment within the regulation.

Since the value of this motor vehicle appears to be no more than $3,400, it is evident that the male respondent has not satisfied the $10,000 requirement of the

present formulation of the regulation. He nevertheless maintains that this business investment, standing alone, qualifies him for the labor certification exemption under the earlier wording of the regulation as interpreted by our holding in Matter of Finau, 12 I&N Dec. 86 (BIA 1967). In Finau we held that the requirement of the old regulation regarding the investment of a "substantial amount of capital" did not mandate an absolute minimum capital outlay, but rather that the term "substantial" embraced a relative concept necessitating that the investment must be substantial only in relation to the total capital requirements of the particular enterprise. We also examined the skills which the alien possessed and considered the likelihood of success of the enterprise, even though these factors appear to be quite unrelated to whether a given investment is "substantial" or not. However, in view of the rationale behind the enactment of section 212(a)(14), we are convinced that the Finau approach to the regulation is unsatisfactory.

Section 212(a)(14) was incorporated in the Act as a measure designed to protect the livelihood of workers lawfully present within the United States. It was intended to prevent "an influx of aliens entering the United States for the purpose of performing skilled or unskilled labor where the economy of individual localities is not capable of absorbing them at the time they desire to enter this country." 1/ Consequently, the language of either approach to the regulation must be construed in a manner consistent with the congressional purpose of safeguarding existing employment opportunities. This suggests an interpretation that would assure that the entering alien not be an individual likely to replace an existing American worker or fill a function readily available to American aspirants.

1/ 1952 U.S. Code Cong. & Ad. News 1705.

The Finau approach is inadequate for several reasons. Initially, the test we adopted there regarding the substantiality of an investment does not provide the necessary assurance that the alien's capital expenditure will not in fact tend to foster his entrance into the labor market as a skilled or unskilled laborer. Instead, a minimal capital investment in a marginal business might provide the necessary impetus for the alien to begin competing with existing workers when the economy of the given locality is not yet capable of adequately absorbing the alien. In addition, Finau, by requiring that the alien show adequate skills and a reasonable possibility of success, added elements to the regulation which do not bear on the substantiality of the investment. Finally, a literal reading of Finau might lead to an unwarranted denial of the "investor" exemption for an alien who seeks to enter the United States for the purpose of investing a large amount of capital in an enterprise whose magnitude is such that the alien's capital contribution is relatively insignificant. Accordingly, Matter of Finau, supra, is overruled.

It is therefore necessary for us to adopt a test concerning substantial investments which comports with the congressional policy contained in section 212(a)(14). The investment must be more than a mere conduit by which the alien seeks to enter the skilled or unskilled labor market. Consequently, the investment either must tend to expand job opportunities and thus offset any adverse impact which the alien's employment may have on the market for jobs, or must be of an amount adequate to insure, with sufficient certainty, that the alien's primary function with respect to the investment, and with respect to the economy, will not be as a skilled or unskilled laborer.

The male respondent has applied $3,400 of his own funds to a business which appears to be marginal in nature. Instead of being an investment with expansive

employment propensities, his action has evidently placed him in competition with numerous other small delivery service drivers. This minimal investment does not adequately insure that the male respondent will not primarily function as a skilled or unskilled laborer, nor does it tend to offset any adverse impact which his employment may have on the job market. We do not deem this to be a substantial investment.

The male respondent's employment does not appear significantly different from other taxi or delivery jobs. He is in a position which essentially involves skilled or unskilled labor. If there is a true shortage of American workers willing to accept this type of job, then obtaining labor certification would appear to be the proper procedure for the male respondent to follow. He is not, however, entitled to the "investor" exemption from the labor certification requirements of the Act.

Consequently, an immigrant visa was not and is not immediately available to the male respondent. He therefore was not statutorily eligible for a grant of section 245 relief. Similarly, the grant of that relief to the female respondent was inappropriate, because without her husband to support her she must also obtain a labor certification to qualify for an immigrant visa. The decision of the immigration judge was incorrect and the Service's appeal will be sustained.

As a result of the action taken by the immigration judge, the issue of voluntary departure was never reached. We shall therefore remand this case for further proceedings.

ORDER: The appeal is sustained.

A19 492 601
A17 587 648

FURTHER ORDER: The grant of adjustment of status to the respondents is withdrawn and the case is remanded to the immigration judge for any further proceedings that may be required.

Chairman

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

Files: (1)- A 19 492 601 - New York

(2) A 17 587 648 - New York

In the Matter of:

1) HEITLAND, Hannelore (female)

and

2) HEITLAND, Heinz H. (male)

- Respondents - In Deportation proceedings

CHARGE: Nonimmigrant - remained longer- (female respondent)
No immigrant visa - (male respondent)

APPLICATION: Status as permanent residents under Section 245 of the Immigration and Nationality Act, - or - Voluntary departure

In Behalf of Service:

Alexander Schonfeld, Esq.,
Trial Attorney
New York, N. Y., 10007

In Behalf of Respondents:

Jules E. Covern, Esq.,
One East 42nd Street
New York, N. Y., 10017

DECISION OF THE SPECIAL INQUIRY OFFICER

The respondents are husband and wife, aliens, natives of Germany. She is still a citizen of Germany, he a citizen of Canada. They both last entered the United States on February 4, 1971 at which time they were returning from a brief absence abroad to resume a residence previously established in the United States. The male respondent is, therefore, deportable as charged in the Order to Show Cause. The female respondent is charged as a visitor who remain longer than authorized.

This charge is sustained although she was also an immigrant at the time of her last entry.

They both now seek status as permanent residents under Section 245 of the Immigration and Nationality Act. They both have been examined and passed by the United States Public Health Service. A check of local and federal records reveal no arrest or criminal record. The sole issue is whether the respondents are qualified for the status of permanent residence under Section 212(a)(14) of the Immigration and Nationality Act. The female respondent is not employed and she is dependent upon her husband. He seeks to establish that he is not required to present a labor certification under Section 212(a)(14) as an alien who will engage in a commercial enterprise in which he has invested or is actively in the process of investing a substantial amount of capital.

In August, 1968, the male respondent who had been employed in other fields in the past decided to establish a merchandise and messenger delivery service. He purchased a Volkswagon panel truck in October, 1968 for $2,700. He has since been engaged in the business of delivering letters and smaller packages to places in the New York metropolitan area. He obtains almost all of his trade from a company which obtains such orders. He is one of many sub-contractors who accept orders from them, carries them out, and receives sixty percent of their fee. He has some personal customers whose business he also handles from time to time. In August 1971 he purchased a new Volkswagon panel truck for $3,000. This truch has seats in the rear which are removable and is

used for carrying merchandise up to one and a half tons. When the packages are larger and requires it he removes the back seat so that he can accommodate the larger loads. This panel truck is not used for anything other than the business as he has a private automobile for use of himself and his family. He has a two-way radio in this car so that he can be in touch with the firm that hires him to deliver merchandise. In 1970 he did a gross annual business of $14,000, but netted only $4,000. He has no other business or occupation. However he does have substantial assets consisting of $6,000 in a savings bank and some property purchased many years ago, in Florida, which he values at $11,000 He maintains that once he acquires legal residence status, he will be able to obtain bonding which is necessary to engage in the trucking business on a larger scale. He says that this lack of legal status prevents expansion of his trade. He hopes thereafter to expand his business without the use of an intermediary. He would also purchase at that time a larger truck for the shipping of different and larger types of merchandise.

While it is true that his only direct investment to date is the panel truck which cost him $3,000, as he has been operating the business for four years as his sole occupation, I find that he has the equipment, the know-how and facilities to carry on a commercial enterprise. In this period of time he has also acquired the ability and has the capital to expand it further. Therefore I find that he is exempt from the labor

certification requirement of Section 212(a)(14), as an alien who will engage in a commercial enterprise in which he has invested and is actively in the process of investing a substantial amount of capital. See Matter of Finau, 12, I & N Dec. 86.

I turn now to the question of whether they should be granted this relief as a matter of discretion. I note that the respondents were seeking the status of permanent residence under Section 245 after their entry in 1968 and prior to their departure in December, 1970, for a brief visit to Germany occasioned by an emergency in the family. Obviously, when they returned in February 1971, they intended to seek adjustment once more and were not bonafide nonimmigrants. However, I note, on the other hand, that there is no substantial reason why the respondents were not adjusted prior to their departure. The record is not clear on that point. They are parents of a United States citizen child born here in 1969. Under these circumstances, as they meet all the qualifications of the statute and regulations, their applications will be granted.

ORDER: IT IS ORDERED that the respondents' status as permanent residents under Section 245 of the Immigration and Nationality Act be granted.

A I Maltin

AARON I. MALTIN
Special Inquiry Officer

28—Affidavit of Service by Mail.

Excelsior Stationery Co., Law Blank Publishers
116 Nassau Street, New York

UNITED STATES ~~DISTRICT~~ COURT
~~SOUTHERN DISTRICT OF NEW YORK~~ OF APPEALS 2ND CIRCUIT

HEINZ H. HEITLAND and
HENNELORE HEITLAND, Plaintiffs,

VS.

IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

State of New York County of New York ss:

Mitch Korder being duly sworn, says that he is an employee of the Attorney for the above named plaintiffs reside at Yonkers, N. Y. Deponent further says, he did, on the 23rd day of August 1976 serve upon Robert Fiske Jr., U.S. the Attorney in the above entitled action for the above named Immigration and Naturalization Service,

of which the annexed is a copy, by depositing the same, properly inclosed in a post-paid wrapper, in the Post Office at 450 Lexington Avenue aforesaid, directed to said U.S. Attorney at 1 St. Andrews Plaza, N. Y. New York 10007 that being the address, within the State, designated by h for that purpose upon the preceding papers in the action and h place of residence, or the place where h then kept an office, between which places there then was and now is a regular communication by mail.

Sworn and subscribed before me, the 23rd day of August 1976

MITCH KORDER

JULES COVEN
Notary Public, State of New York
No. 43-5838275
Qualified in Richmond County
Commission Expires March 30, 1978